



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE No. 275 OF 1998

DHANJI JADRA RAMJIPLAINTIFF

VERSUS

COMMISSIONER OF PRISONS1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

RULING

(An application for stay of execution pending hearing and determination of an appeal; test applicable; held that loss of both possession and title to land amounts to substantial loss; applicant guilty of unreasonable delay; application allowed on conditions)

Introduction

1. What is before the court for determination is plaintiff's Notice of Motion dated 15th December 2011. The plaintiff seeks the following orders:

1. Spent.
2. Spent.
3. THAT pending hearing and determination of the appeal to the Court of Appeal the honourable court be pleased to stay execution of the decree issued herein.
4. THAT the costs of this application be in the cause.

Applicant's Case

2. The applicant's case is contained in the Notice of Motion dated 15th December 2011 and the supporting affidavit, the Further Affidavit sworn by the plaintiff on 15th February 2017 and filed in court on 16th February 2017, the summons filed on 23rd February 2017 and the Rebuttal submissions filed on 10th March 2017.

3. Pursuant to judgment delivered on 13th October 2011 the plaintiff's case was dismissed with costs. In the cause of the judgment the court also stated as follows:

“The allotment to the plaintiff was therefore void ab initio, and the subsequent lease and

certificate of lease were also void and are cancelled forthwith”

Being aggrieved with the judgment, the plaintiff lodged Notice of Appeal on 19th October 2011. The plaintiff now seeks stay of execution of the judgment and decree pending the hearing and determination of an appeal to the Court of Appeal.

4. The plaintiff deposes that the effect of the judgment is to vest the whole of the Nakuru Municipality Block 21/514, the suit property, in the 1st defendant. That the plaintiff has developed the land by constructing thereon a store, a flat and a garage and that the property constitutes his only source of income. He deposes that unless stay is granted, his buildings will be demolished, he will be evicted and he will lose his source of income.

Respondent's Case

5. The defendants'/respondents' case is contained in the Replying Affidavit of John K. Nkoria sworn and filed herein on 20th February 2012, the replying affidavit of James K. Sawe sworn on 13th February 2017 and filed herein on 9th March 2017 and submissions dated 4th March 2017 and filed in court on 7th March 2017.

6. It is deposed by the defendants that no loss or damage will be occasioned to the plaintiff if stay is not granted since the land belongs to the government and that the government can compensate the plaintiff. That the application has been filed after inordinate delay, that there has been inordinate delay in the prosecution of the application and that the 1st defendant should be allowed to enjoy its property.

Applicant's submissions

7. The applicant filed submissions in support of the application and further submissions in rebuttal of the respondent's submissions. The applicants also filed a list of authorities.

8. Counsel for the applicant submitted that the applicant has satisfied the conditions for grant of stay. That the application was filed without unreasonable delay considering that at the time of delivery of judgment the plaintiff was out of the county for treatment.

9. Regarding the issue of substantial loss, counsel submitted that if the judgment and decree are enforced, the plaintiff will be dispossessed and evicted from the whole of the suit property while his case was only in respect of a portion that was being trespassed upon by the defendants. That eviction of the plaintiff will result in demolition of his buildings leading him to thereby lose not only the use of the buildings but also lose income. Citing the case of **Tropical Commodity suppliers Ltd & Others -vs- International Credit Bank (In Liquidation)** 2004 E.A as quoted in **John Odongo -vs- Joyce Irungu Muhatia** 2015 eKLR, counsel submitted that substantial loss only needs to be any loss that is of real value and that in the circumstances the applicant had established substantial loss. Counsel further cited **Kevisu Kimwele -vs- Benjamin Mulei Musaki** 2014 eKLR in support of the submission that an eviction amounts to substantial loss.

Regarding the issue of security, counsel submitted that the applicant is ready to abide by any condition imposed by the court.

Respondents' Submissions

10. Counsel for the respondents submitted that since the subject of the suit is land, it is fixed, immovable and will not be consumed or disappear. Even the developments on the property can be reconstructed. Consequently, there will be no substantial loss.

11. Counsel further submitted that owing to the delay in filing the record of appeal, there is no appeal. Further, that contrary to Order 42 rule 6 (a) of the Civil Procedure Rules, there has been a delay of six

year in prosecuting the application and this constitutes inordinate delay.

Citing **Antoine Ndiaye -vs- African Virtual University** [2015] eKLR, counsel submitted that litigation should come to an end and that the 1st defendant should be allowed to peacefully enjoy the land.

Analysis and Determination

12. The application is brought under Order 42 rule 6 of the Civil Procedure Rules, 2010. The rule states :

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. Consequently, in an application under Order 42 rule 6 the applicant must satisfy the court that he may suffer substantial loss unless the order is made and further that he has made the application without unreasonable delay.

14. The decree herein has the effect of declaring void the allotment of the suit land to the plaintiff. The plaintiff's lease and certificate of lease have also been thereby cancelled. Unless stay pending appeal is granted, the plaintiff is likely to lose both possession and title to the suit land before the appeal is determined. Additionally, the plaintiff's buildings may be demolished. All this would no doubt be substantial loss.

15. Has the plaintiff made the application without unreasonable delay? The judgment sought to be stayed was delivered on 13th October 2011 while the application for stay was filed on 15th December 2011. The plaintiff has explained that he was away seeking medical attention in India when the judgment was delivered and hence the delay of two months in filing the application. Though no travel documents were availed, I am prepared to give the plaintiff the benefit of doubt.

16. However, the issue of delay does not end there. The application was not prosecuted for over five years. The plaintiff has explained that he had to file an application for review to correct certain perceived errors in the judgment. I have perused the record and I have noted that the application for review was filed on 11th July 2012 and ruling thereon was delivered on 27th June 2014. There followed a lull of two years during which the plaintiff did nothing to prosecute the application for stay. It was not until 10th June 2016 when the application was placed before Munyao J.

17. What about the appeal to the court of appeal? Has there been progress in its hearing and disposal? The respondent submitted that no record of appeal has been filed. I have again noted from the record herein that the decree was extracted on 9th March 2017 and a Certificate of Delay was issued by the Deputy Registrar on 9th March 2017 stating that the plaintiff requested for the typed proceedings on 1st July 2014

and that the same were availed on 28th February 2017.

18. All in all, I am not persuaded that the plaintiff is not guilty of unreasonable delay as regards the prosecution of both the application for stay and the appeal itself. The requirement that there be no unreasonable delay is not an idle one. A party seeking stay pending appeal should not keep the successful litigant in suspense for an unduly lengthy period. By its very nature, stay pending appeal entails keeping the successful litigant from enjoying the fruits of its litigation during the pendency of the appeal. Such a state of affairs should be for the shortest period possible as otherwise there would be an injustice to the successful litigant.

19. I have already found above that the plaintiff will suffer substantial loss if stay is not granted. Should I now dismiss the application on account of unreasonable delay? I am of the view that in the circumstances of this case an order for stay ought to issue. To safeguard the interests of the decree holder, the stay will be for a limited period. Such limitation is necessary in view of the fact that the plaintiff has not approached the appeal with the industry that is required.

20. I therefore make the following orders:

- a) Pending hearing and determination of the appeal to the Court of Appeal there be stay execution of the decree issued herein.
- b) The stay orders will remain in force for a maximum of one (1) year from the date of delivery of this ruling and shall lapse automatically upon expiry of that period or upon determination of the appeal, whichever occurs earlier.
- c) The plaintiff shall bear the costs of the application.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of April 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kibet for the plaintiff.

No appearance for the defendants.

Court Assistant: Gichaba